90-953

FILED
DEC 17
JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the Supreme Court of the United States

October Term, 1990

CITY GAS COMPANY OF FLORIDA,

Petitioner,

vs.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James J. Kenny
Scott E. Perwin
KENNY NACHWALTER SEYMOUR & ARNOLD, P.A.
400 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 358-8151

Michael Malina,
Counsel of Record
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
Telephone: (212) 836-8000

Attorneys for Petitioner

QUESTIONS PRESENTED

A divided en banc court of appeals found petitioner, a regulated retailer of natural gas in Florida, liable for monopolization for entering into a territorial agreement with another retailer which had been repeatedly reviewed and approved by the Florida Public Service Commission ("FPSC") under statutory authority expressly upheld by the Florida Supreme Court; and for refusing to sell or transport natural gas at wholesale to respondent, a potential retail competitor demonstrably able to obtain the product from an alternative source at reasonable cost. Under a pervasive scheme of federal and state regulation, sales of natural gas at wholesale by the sole wholesaler in Florida (from which petitioner purchases its entire supply) may be made only to persons granted allocations by the Federal Energy Regulatory Commission ("FERC"), and sales of gas at retail are regulated by the FPSC. The questions presented are:

1. Whether a regulated public utility retailer violates § 2 of the Sherman Act under the "essential facilities" doctrine by declining to sell or transport natural gas at wholesale to a potential retail competitor, where: (a) the retailer has never sold at wholesale; and (b) the retailer's own wholesale supplier is ready and able to supply the potential competitor subject to reasonable conditions prescribed by FERC?

2. Whether petitioner's conduct is protected from antitrust liability by the state action doctrine, given that: (a) a Florida statute expressly permits public utilities to decline to furnish natural gas for resale; (b) the territorial agreement was submitted to and approved by the FPSC pursuant to regulatory authority granted by a state statute and confirmed by a controlling decision of the Florida Supreme Court; and (c) Florida closely regulates the conduct of natural gas utilities in every relevant respect?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	2
Grounds for Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
I. The Court of Appeals Broke With Fundamental Antitrust Principles And Created A New Rule Of Liability For Monopolization Which Merits Review By This Court	7
A. There Was No Monopoly	8
B. There Was No "Essential Facility"	9
II. In Rejecting City Gas' State Action Defense, The Court Of Appeals Improperly Ignored A Holding Of The State Supreme Court On The Meaning Of A Florida Statute And Disregarded This Court's Precedents	14
A. Clear Articulation	15
B. Active Supervision	19
Conclusion	23

TABLE OF AUTHORITIES

Cases	Page(s)
Aero Mayflower Transit Co. v. Bd. of R.R. Comm'ers, 332 U.S. 495 (1947)	16
Albertson v. Millard, 345 U.S. 242 (1953)	16
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)	11
Associated Press v. United States, 326 U.S. 1 (1945)	9, 11
Barry v. Blue Cross of California, 805 F.2d 866 (9th Cir. 1986)	9
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 87 (1980)	15
Campbell v. City of Chicago, 823 F.2d 1182 (7th Cir. 1987)	17
Central Iowa Refuse Sys., Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985)	17
City Gas Co. v. Peoples Gas Sys., Inc., 182 So.2d 429 (Fla. 1965)	3, 15, 18, 19
City of North Olmstead v. Greater Cleveland Regional Transit Authority, 722 F.2d 1284 (6th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984)	17
Community Builders, Inc. v. City of Phoenix, 652 F.2d 823 (9th Cir. 1981)	17

TABLE OF AUTHORITIES—(Continued)

Cases	Page(s)
Consolidated Gas Co. of Fla., Inc. v. City Gas Co. of Fla., 912 F.2d 1262 (11th Cir. 1990) (en banc)	2, 11, 13
Consolidated Gas Co. of Fla., Inc. v. City Gas Co. of Fla., 889 F.2d 264 (11th Cir. 1989)	2
Consolidated Gas Co. of Fla., Inc. v. City Gas Co. of Fla., 880 F.2d 297 (11th Cir. 1989)	2, 8, 15, 16
Consolidated Gas Co. of Fla., Inc. v. City Gas Co. of Fla., 665 F. Supp. 1493 (S.D. Fla. 1987)	2, 13
Consolidated Gas Co. of Fla. v. Fla. Gas Transmission Co., 28 F.E.R.C. ¶ 61,350 (1984)	4
Consolidated Television Cable Service, Inc. v. City of Frankfort, Ky., 857 F.2d 354 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1537 (1989)	17
Cramp v. Bd. of Public Instruction, 368 U.S. 278 (1961)	16
Dimmitt Agri Indus., Inc. v. CPC Int'l Inc., 679 F.2d 516 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983)	9
Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606 (6th Cir. 1987)	12
Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	13

TABLE OF AUTHORITIES—(Continued)

Cases	Page(s)
Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157 (1916)	16, 17
Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982)	17
Fla. Cities v. Fla. Power & Light Co., 525 F. Supp. 1000 (S.D. Fla. 1981)	12
Fla. Public Service Comm'n v. Fuller, 551 So.2d 1210 (Fla. 1989)	15, 18
Fuchs v. Rural Elec. Convenience Cooperative, Inc., 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1744 (1989)	20
Garner v. Louisiana, 368 U.S. 157 (1961)	16
Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430 (9th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985)	17
Griffin v. Wisconsin, 483 U.S. 868 (1987)	16
Hebert v. Louisiana, 272 U.S. 312 (1926)	16
Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978)	10, 12
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	16

TABLE OF AUTHORITIES—(Continued)

Cases	Page(s)
NAACP v. Button, 371 U.S. 415 (1963)	16
New England Motor Rate Bureau, Inc. v. Federal Trade Comm'n, 908 F.2d 1064 (1st Cir. 1990)	20
Oberndorf v. City and County of Denver, 900 F.2d 1434 (10th Cir.), *cert. denied*, 111 S. Ct. 129 (1990)	17
O'Brien v. Skinner, 414 U.S. 524 (1974)	16
Olympia Equipment Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987)	14
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	10, 11
Parker v. Brown, 317 U.S. 341 (1943)	6, 22
Patrick v. Burget, 108 S. Ct. 1658 (1988)	19, 20, 21
Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985)	9
Peoples Gas Sys., Inc. v. City Gas Co., 167 So.2d 577 (Fla. App. 1964), *aff'd*, 182 So.2d 429 (Fla. 1965)	3
Peoples Gas Sys., Inc. v. Mason, 187 So.2d 335 (Fla. 1966)	20

TABLE OF AUTHORITIES—(Continued)

Cases	Page(s)
Pueblo Aircraft Service, Inc. v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982), *cert. denied*, 459 U.S. 1126 (1983)	17
Robinson v. Magovern, 521 F. Supp. 842 (W.D. Pa. 1981), *aff'd*, 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982)	12
Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981)	16
Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985)	6, 14, 17, 18, 19, 21
Storey v. Mayo, 217 So.2d 304 (Fla. 1968), *cert. denied*, 395 U.S. 909 (1969)	20
Supreme Lodge v. Meyer, 265 U.S. 30 (1924)	17
324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987)	16
Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990)	8, 9
Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)	22
Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566 (2d Cir. 1990)	12
United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)	9

TABLE OF AUTHORITIES—(Continued)

Cases	Page(s)
United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956)	8, 9
United States v. Southern Motor Carriers Rate Conference, 702 F.2d 532 (5th Cir. Unit B 1983) (en banc), *rev'd*, 471 U.S. 48 (1985)	20
United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912)	9, 11
Utilities Comm'n of New Smyrna Beach v. Fla. Public Service Comm'n, 469 So.2d 731 (Fla. 1985)	20
Winters v. New York, 333 U.S. 507 (1948)	17
Statutes and Rules	
15 U.S.C. § 2	2, 5, 6
15 U.S.C. § 15	2
15 U.S.C. § 26	2
15 U.S.C. § 717f(a)	3
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	5
28 U.S.C. § 1337	5
Fla. Stat. § 350.128	20
Fla. Stat. ch. 366	2, 3
Fla. Stat. § 366.03	8, 19
Fla. Stat. § 366.04	15
Fla. Stat. § 366.041	18

TABLE OF AUTHORITIES—(Continued)

Statutes and Rules	Page(s)
Fla. Stat. § 366.06	18
Fla. Stat. § 366.10	20
Supreme Court Rule 29.1	1
Fla. Admin. Code r. 25-9.034	21
1989 Fla. Laws ch. 89-292	16
Orders of the Florida Public Service Commission	
FPSC Order No. 3051	3
FPSC Order No. 3736	4, 19
FPSC Order No. 5495	4, 19
FPSC Order No. 5800	4, 19
Other Authorities	
P. Areeda & D. Turner, *Antitrust Law* (1978)	22
P. Areeda & H. Hovenkamp, *Antitrust Law* (Supp. 1990)	10, 21

NO.

in the Supreme Court of the United States

October Term, 1990

CITY GAS COMPANY OF FLORIDA,

Petitioner,

vs.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, City Gas Company of Florida ("City Gas"),[1] requests that a writ of certiorari issue to review the en banc judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on September 19, 1990.

[1]At the times relevant to this case, City Gas was a Florida corporation. It has since merged into (and is now a division of) Elizabethtown Gas Company, a New Jersey corporation. Pursuant to Supreme Court Rule 29.1, City Gas states that Elizabethtown Gas Company is a subsidiary of NUI Corporation and has no subsidiaries of its own.

OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. A) is reported at 880 F.2d 297 (11th Cir. 1989). The per curiam plurality opinion and four dissenting opinions of the court of appeals sitting en banc (Pet. App. B) are reported at 912 F.2d 1262 (11th Cir. 1990). The order of the court of appeals granting rehearing en banc (Pet. App. C) is reported at 889 F.2d 264 (11th Cir. 1989). The opinion of the district court (Pet. App. D) is reported at 665 F. Supp. 1493 (S.D. Fla. 1987).

GROUNDS FOR JURISDICTION

The judgment of the court of appeals was entered on September 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The text of § 2 of the Sherman Act, 15 U.S.C. § 2, §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and chapter 366 of the Florida Statutes, Fla. Stat. ch. 366, is set forth in the appendix to this petition (Pet. App. E-H).

STATEMENT OF THE CASE

City Gas is a retail distributor of natural gas serving approximately 100,000 residential, commercial and industrial customers in several Florida counties. It began business in 1949 as a retail distributor of liquid petroleum ("LP") (propane) gas and converted to natural gas when that product became available in Florida in 1960.

The LP gas industry is unregulated. In contrast, the distribution of natural gas is pervasively regulated at both the federal and state levels. Under federal law, any firm

wishing to purchase natural gas from an interstate wholesale supplier must first obtain an "allocation" from FERC, which is charged with determining whether such purchases are "necessary or desirable in the public interest." 15 U.S.C. § 717f(a). FERC also regulates the prices charged by interstate natural gas producers and wholesalers. The rates, services and operations of retail natural gas distributors in Florida are pervasively regulated by the FPSC. *See* Fla. Stat. ch. 366.

City Gas sought and obtained a natural gas allocation from FERC's predecessor agency in 1960 and has since purchased all of its natural gas supply from Florida Gas Transmission Company ("FGT"), the only wholesale supplier of natural gas in the state of Florida. City Gas has never sold natural gas at wholesale.

In 1960, City Gas entered into a territorial agreement with Peoples Gas System, Inc. ("Peoples") under which each party agreed not to sell natural gas in the other's service area. This agreement was submitted to and formally approved by the predecessor of the FPSC, which held that such agreements are in the public interest and should be encouraged. FPSC Order No. 3051, Docket No. 6231-GU (1960) (Pet. App. I), *quoted in Peoples Gas Sys., Inc. v. City Gas Co.*, 167 So.2d 577, 580-81 (Fla. App. 1964), *aff'd*, 182 So.2d 429 (Fla. 1965). In 1962, the agreement was the subject of an action by Peoples against City Gas which ultimately resulted in a Florida Supreme Court decision in favor of Peoples. *City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d 429 (Fla. 1965). The state's highest court held that the Commission has authority under chapter 366 of the Florida Statutes to approve territorial agreements between natural gas utilities; that such agreements are void and unenforceable unless approved by the Commission, whereupon they become "an order of the commission, binding as such upon the parties," *id.* at 436; and that, when

so approved, such agreements do not violate the state antitrust laws.[2]

In March 1982, Respondent Consolidated Gas Company of Florida, Inc. ("Consolidated") was a retail distributor of LP gas to approximately 2000 residential and ten commercial customers in a subdivision of southern Dade County, Florida. Because the price of LP gas at the time was roughly twice that of natural gas, Consolidated decided to leave the unregulated LP gas market and convert its facilities to the distribution of natural gas. When Consolidated contacted FGT, the sole wholesale supplier of natural gas in Florida, it was informed that a FERC allocation would be required in order to purchase gas from FGT, and that Consolidated would have to reimburse FGT for the cost of constructing a connection to FGT's wholesale pipeline—a cost estimated at approximately $250,000. Consolidated accordingly applied to FERC for a natural gas allocation on May 21, 1982.

Despite opposition by FGT (as well as Peoples and City Gas), Consolidated's application was granted by an administrative law judge in November 1983 and affirmed by FERC in September 1984. *Consolidated Gas Co. of Fla. v. Fla. Gas Transmission Co.*, 28 F.E.R.C. ¶ 61,350 (1984). FERC's decision required FGT to sell natural gas to Consolidated at FGT's regulated wholesale rates. The agency also ruled that Consolidated had to pay the cost of constructing a lateral extension between its system and FGT's pipeline. In so ruling, FERC concluded that there was a "reasonable likelihood" that, under these conditions, Consolidated would retain its customers and, therefore, that

[2]Following the decisions of the Florida courts, the FPSC exercised its statutory authority to review and ultimately reaffirm the validity of the City Gas-Peoples territorial agreement on three subsequent occasions. FPSC Orders Nos. 3736 (1965), 5495 (1972) and 5800 (1973).

its proposal to resell natural gas purchased from FGT was "economically feasible." *Id.* at 61,638; App. D-20.

During the course of the FERC proceedings, Consolidated approached City Gas about the possibility of purchasing natural gas at wholesale from City Gas rather than FGT.[3] City Gas offered to sell natural gas to Consolidated at City Gas' wholesale cost plus ten cents per therm,[4] an offer that was later lowered to cost plus seven cents per therm.[5] Although Consolidated's counteroffers went as high as cost plus five cents per therm, it ultimately rejected City Gas' proposal as unreasonable and brought this action against City Gas in United States District Court for the Southern District of Florida, contending that City Gas had refused to deal with it in violation of § 2 of the Sherman Act.[6]

After a bench trial, the district court found City Gas liable for monopolization and awarded Consolidated treble damages of $4,761,195.45, plus interest, costs and attorneys' fees. The district court concluded that City Gas had unlawfully acquired monopoly power by virtue of the 1960 territorial agreement with Peoples Gas, that it had unlawfully maintained that power by refusing to deal with Consolidated, and that neither course of conduct was

---

[3]An alternative was to use City Gas' pipes to transport gas purchased from FGT, assuming that FERC granted Consolidated an allocation.

[4]A therm is the standard unit of measurement in the natural gas industry and is equivalent to 100,000 British thermal units.

[5]The wholesale price paid by City Gas to FGT at this time was roughly 32 cents per therm, and the retail price was approximately twenty cents higher. City Gas' offer was thus more than ten cents per therm *below* the rate paid by all of City Gas' other customers—the regulated rate at which City Gas' shareholders receive a fair return on their investment.

[6]Jurisdiction in the district court rested on 28 U.S.C. §§ 1331 and 1337.

protected from antitrust liability under the doctrine of state action immunity.[7]

The district court's judgment was affirmed by a panel of the Court of Appeals for the Eleventh Circuit. City Gas' timely petition for rehearing was granted, and the appeal was reheard en banc. A divided court of appeals reinstated the panel opinion, with four separate dissenting opinions, including an 86-page dissent by Chief Judge Tjoflat.

REASONS FOR GRANTING THE WRIT

Departing from settled antitrust principles and misapplying controlling decisions of this Court, the court of appeals has invoked Section 2 of the Sherman Act to condemn as monopolization a regulated retailer's unilateral decision not to enter the wholesale market in order to subsidize the entry of a potential competitor which can readily obtain a supply at wholesale from an alternative source. This perversion of the "essential facilities" doctrine has, in the words of one of the dissenting judges below, "created a new rule of liability under Section 2"—a rule without support in this Court's decisions and in conflict with those of other courts of appeals.

In addition, in rejecting the applicability of the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny, the court of appeals has disregarded this Court's decision in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), and violated fundamental principles of federalism by declining to follow a controlling

[7]In addition to the damage award, the district court granted Consolidated permanent mandatory injunctive relief, requiring City Gas to transport or sell natural gas to Consolidated at reasonable prices to be determined by the FPSC on application by Consolidated. To date, no such application has been made.

decision of the State's highest court on the interpretation of a Florida statute.

The court of appeals' decision in this case is unprecedented and in square conflict with holdings of other circuit courts of appeals. Moreover, it involves legal issues going to the essence of the offense of monopolization and implicating principles of federal-state accommodation at the heart of the state action doctrine. We respectfully submit that this Court should review the decision of the court of appeals to settle these important questions.

I

The Court Of Appeals Broke With Fundamental Antitrust Principles And Created A New Rule Of Liability For Monopolization Which Merits Review By This Court

The court of appeals held City Gas liable for monopolization under the so-called "essential facilities" doctrine, ruling that its refusal to supply Consolidated with wholesale natural gas at a price Consolidated found acceptable amounted to denial of access to an "essential facility" which Consolidated needed to compete in the retail market. That ruling, which is without precedent, distorts fundamental antitrust principles and threatens to stifle competition and undermine the efficacy of federal and state regulatory regimes throughout the Eleventh Circuit.

The decision below fastens monopolization liability on a company which: (1) has never made any sales in the relevant market and, hence, cannot possess monopoly power as a matter of law; and (2) does not control an "essential facility" because potential competitors like Consolidated can obtain a supply of wholesale natural gas from FGT simply by

complying with the conditions imposed by FERC. In such circumstances, liability for monopolization is not only legally insupportable but bizarre, as Chief Judge Tjoflat demonstrates in his lengthy and cogent dissent.

A. *There Was No Monopoly.* The court of appeals rested its holding on a manifestly erroneous and potentially mischievous premise: that City Gas, which has never made a sale at wholesale,[8] has "monopoly power in the wholesale market for the resale of natural gas." App. A-5. To our knowledge, that is the only decision in the one-hundred-year history of the Sherman Act in which a firm with a *0%* market share—a firm which is itself supplied by the only seller in the market—has been found to possess monopoly power in that market. As the court of appeals itself noted, FGT is the only wholesale supplier of natural gas in Florida and therefore has a 100% share of the wholesale market. App. A-2. As a matter of law, City Gas cannot conceivably have monopoly power in a market in which it has never sold. Absent such power, the judgment below cannot stand.[9]

---

[8]As the court of appeals pointed out, City Gas at one time entered into a contract to sell gas to FGT's former retail affiliate, but no gas was ever sold under that agreement. App. A-5.

[9]Only the existence of monopoly power at the wholesale level can sustain the judgment below, because that is the level at which City Gas allegedly sought to charge a supracompetitive price. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 29 (1st Cir. 1990). The holding below that City Gas has monopoly power in the retail market is equally unfounded. Monopoly power is "the power to control prices or exclude competition." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). City Gas lacks the power to control retail prices because its prices are controlled by the Florida Public Service Commission. Similarly, City Gas lacks the power to control the market price indirectly by reducing output because it is required by state law to serve all end-users who request service. Fla. Stat. § 366.03. And City Gas lacks the power to "exclude competition" from the retail market because entry is controlled by FERC, which has exclusive authority over the grant of natural gas allocations and the sale of wholesale natural gas by FGT.

It is settled antitrust doctrine that proof of monopoly power requires a showing that the putative monopolist has at least a substantial share of sales in the relevant market. In *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945), Judge Learned Hand wrote that a ninety percent share of the relevant market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." Judge Hand's statement has been followed in countless decisions. *See, e.g., Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 30 (1st Cir. 1990) (market share of less than 12% was insufficient as a matter of law); *Barry v. Blue Cross of California*, 805 F.2d 866, 874 (9th Cir. 1986) (16% insufficient); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 261 (3d Cir. 1984) (32-35%), *cert. denied*, 471 U.S. 1016 (1985); *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 528-31 (5th Cir. 1982) (17% and 25%), *cert. denied*, 460 U.S. 1082 (1983). *See also United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) (no monopoly power where defendant had less than 20% share of the relevant market).

By declaring City Gas a monopolist in a market in which it has never participated, the court of appeals not only generated a conflict among the circuits but committed a fundamental legal error which, if not reviewed and corrected by this Court, will undoubtedly skew application of the Sherman Act in the Eleventh Circuit.

B. *There Was No "Essential Facility."* In a flagrant misapplication of the "essential facilities" doctrine, the court of appeals found that City Gas' refusal to sell natural gas at wholesale to Consolidated at a price acceptable to respondent constituted an act of monopolization. The "essential facilities" doctrine—which derives from this Court's decisions in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), *Associated Press v. United States*, 326

U.S. 1 (1945), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)—renders it unlawful for a monopolist to deny access to a facility or resource which it controls if access to that facility or resource is essential to another's ability to compete with the monopolist. *See, e.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

Because it runs counter to fundamental competitive principles by requiring a firm to facilitate or subsidize its competitors' business, the "essential facilities" doctrine must be carefully circumscribed to avoid chilling legitimate competition under the guise of proscribing monopolization. "Liability for denying another access to one's goods, services, or facilities should be exceptional." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 736.2a at 762 (Supp. 1990). In applying the doctrine here, the court of appeals created a new and invidious rule of Section 2 liability by concluding that access to City Gas' pipeline was essential to Consolidated's ability to enter the retail market in the face of FERC's finding that Consolidated could feasibly enter the market with a supply from FGT. The decision below thus stands for the unprecedented and manifestly unsound proposition that a firm engaged exclusively in the retail sale of a commodity is obligated to enter the wholesale market and sell its product to a potential competitor in order to save that competitor a $250,000 expense imposed by the responsible federal regulatory authority as a condition of obtaining the product from the very wholesale source supplying the retailer.

1. *City Gas Is Not Vertically Integrated.* In the typical case, the "essential facilities" doctrine applies to refusals by a vertically integrated monopolist (or combination of vertically integrated sellers) to afford access to a product or service sold in one of two related markets served by the monopolist to firms which compete with it in

the other. *Terminal Railroad, Associated Press* and *Otter Tail* are illustrative. In each, the defendant or defendants were vertically integrated firms which used their monopoly position in an "upstream" market to disadvantage competitors in a "downstream" market. As Chief Judge Tjoflat pointedly observed in his dissent below, the doctrine deals with a form of "monopoly leveraging" and is designed to prohibit "a monopolist's extension of power from one stage of the market into another . . ." App. B-54. Where the defendant is not vertically integrated, there can be no such leveraging and no significant threat to competition.

It is undisputed that City Gas has never sold natural gas at wholesale and, thus, is not vertically integrated. With no position whatsoever—much less monopoly power—in the wholesale market, it cannot leverage control over wholesale distribution to disadvantage competition in the downstream retail market. By applying the "essential facilities" doctrine in such circumstances, the court of appeals severed the doctrine from its moorings and fashioned a rule of law which would unduly hinder a competitor's ability to compete by imposing on it unwarranted obligations to facilitate its competitors' entry.[10]

2. *City Gas' Pipelines Are Not "Essential."* Prior to the decisions below, courts applying the "essential facilities" doctrine have uniformly recognized that, as an exception to the general rule permitting firms—even monopolists—to choose those with whom they will do business, the doctrine requires a threshold showing that the facility in question is

---

[10]The court of appeals does not cite this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), in support of its rule of law. This is not surprising, as *Aspen Skiing* dealt with a very different circumstance—a monopolist's *withdrawal* of support from a competitor with whom it has long been dealing. As this Court explained, the decision condemned "a decision by a monopolist to make an important change in the character of the market." *Id.* at 604.

truly essential. "At the very least, a plaintiff must demonstrate that 'duplication of the facility would be economically infeasible' and that 'denial of its use inflicts a *severe handicap* on potential [or current] market entrants." *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990) (emphasis and bracketed material in original) (quoting *Hecht v. Pro-Football, Inc.*, 570 F.2d at 992).[11] The courts below disregarded this uniform authority and held that access to City Gas' pipeline was essential to Consolidated's ability to compete despite the fact that Consolidated could have obtained a supply of wholesale gas from FGT simply by making the one-time $250,000 payment to cover the cost of interconnection required by FERC after an allocation proceeding mandated by Congress. That holding not only distorts fundamental antitrust precepts but also disregards Congress' decision to subject entry into natural gas distribution to federal regulation.

The courts below deemed City Gas' supply of natural gas to be "essential" only because Consolidated wished to avoid two claimed obstacles to its entry into the retail market: (1) the estimated $250,000 cost of connecting its distribution system with FGT's wholesale pipeline, as required by FERC; and (2) the delay inherent in the federal regulatory approval process. Neither is sufficient to support the conclusion that City Gas' pipeline is an "essential facility."

---

[11] *Accord, Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612-13 (6th Cir. 1987) (control over white pages listings and telephone billing did not constitute essential facility where competitors could compete without it); *Fla. Cities v. Fla. Power & Light Co.*, 525 F. Supp. 1000, 1007 (S.D. Fla. 1981) (electric utility's generating units were not essential to competitor where "access [would] simply improve plaintiff's existing electricity sources" vis-a-vis defendant); *Robinson v. Magovern*, 521 F. Supp. 842, 913 (W.D. Pa. 1981) (existence of residency program and open-heart surgery facilities did not make hospital essential facility), *aff'd*, 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982).

By the district court's own reckoning, an investment of $250,000 represented less than a third of Consolidated's net worth and would have increased Consolidated's market value by some $1.5 million.[12] App. D-32-33. To impose on City Gas a duty to enter the wholesale market in order to save Consolidated an expense of $250,000 trivializes the notion of essentiality—particularly in light of the fact that the federal agency with responsibility for determining the need for new entry into the natural gas market found that entry by Consolidated with a supply from FGT was economically feasible.[13]

As for the second claimed obstacle, it was Congress, not City Gas, which determined that purchases of natural gas from interstate wholesalers should be federally regulated and limited to firms with FERC allocations. Even if the process of obtaining federal regulatory approval had been more onerous than it actually was—the process took only a little more than two years[14]—reliance on that process as a predicate for a finding of essentiality distorts the antitrust laws to circumvent congressional regulatory policy.

In short, the court of appeals' invocation of the "essential facilities" doctrine to force City Gas to become an involuntary wholesaler creates an unprecedented and

---

[12]Thus, as Chief Judge Tjoflat demonstrates in his dissent below, Consolidated could easily have financed the $250,000 cost. App. B-42-44.

[13]By the same token, access to City Gas' pipeline for purposes of transporting gas purchased from FGT cannot be considered essential. The $250,000 cost imposed by FERC would have enabled Consolidated to connect directly to FGT's wholesale pipeline.

[14]While City Gas opposed Consolidated's application (along with FGT and Peoples), that intervention, and any delay it may have caused, are free from antitrust infirmity under *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny. The district court studiously avoided resting antitrust liability on City Gas' participation in the FERC proceedings. App. D-88-89.

potentially ruinous rule of antitrust liability completely at odds with this Court's decisions and those of other circuits. Judge Posner of the Seventh Circuit declared with some confidence four years ago that, notwithstanding the "essential facilities" doctrine: "[I]f a firm went to a monopolist and said, 'Please—for the sake of competition—give me a loan so I can compete with you and make this a competitive market,' and it was turned down, it could not invoke the Sherman Act." *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). The Eleventh Circuit has now effectively held to the contrary. This Court should grant certiorari to resolve the confusion and uncertainty created by the court of appeals' ruling.

II

In Rejecting City Gas' State Action Defense, The Court Of Appeals Improperly Ignored A Holding Of The State Supreme Court On The Meaning Of A Florida Statute And Disregarded This Court's Precedents

The court of appeals held that neither the territorial agreement between City Gas and Peoples nor City Gas' refusal to sell at wholesale was entitled to the protection of the state action doctrine. In so ruling, the court misconstrued controlling decisions of this Court—principally *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985)—and, in the process, inexplicably disregarded a square holding of the Florida Supreme Court on the construction of the relevant Florida regulatory statute and its applicability to the very agreement at issue here. Those fundamental errors implicate principles of federalism at the very core of the state action doctrine and should be reviewed by this Court.

As crystallized in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 87, 105 (1980), the state action doctrine protects conduct otherwise proscribed by the Sherman Act if two conditions are satisfied: (1) the conduct is undertaken pursuant to a clearly articulated and affirmatively expressed state policy intended to replace competition with regulation; and (2) the conduct in question is actively supervised by the state. Both prongs of the *Midcal* test were misapplied below.

A. *Clear Articulation.* The court of appeals found that the City Gas-Peoples agreement was not entitled to state action immunity because of the absence of a clearly articulated state policy. Finding no Florida statute which expressly authorized the FPSC to approve territorial agreements between natural gas utilities, the court concluded, based on its own independent review of the Florida statutes, that "the [Florida] Legislature . . . did not intend for natural gas utilities to . . . enjoy exclusive territorial agreements." App. A-8.

1. *The court of appeals disregarded a controlling decision of the state's highest court.* The Florida Supreme Court has squarely ruled to the contrary. In *City Gas Co. v. Peoples Gas Sys., Inc.*, 182 So.2d 429, 436 (Fla. 1965), a case concerning *this very agreement*, the State's highest court held that "the commission has adequate implied authority under Ch. 366 to validate such agreements as the one before us."[15] The Eleventh Circuit felt free to disregard the state

[15]Although the Florida Supreme Court's decision in *City Gas* predated the 1974 amendment giving the FPSC explicit authority over territorial agreements between electric utilities, the state court has recently made it clear that *City Gas* is still good law. *See Fla. Public Service Comm'n v. Fuller*, 551 So.2d 1210, 1212 (Fla. 1989) ("the PSC has had the implicit power to approve and to modify territorial agreements since before the parties executed the instant agreement [1967]") (citing *City Gas*). Fla. Stat. § 366.04 has recently been amended to make explicit

(Footnote continued on next page)

Supreme Court's interpretation of the Florida statutes because the issue of "clear articulation" is "ultimately a question of federal antitrust law." App. A-10 (emphasis removed).

To be sure, application of the *Midcal* test is ultimately governed by federal law. But that unremarkable fact does not give the federal judiciary authority to interpret a state statute in a manner contrary to the holdings of the state courts. The Sherman Act, like the due process clause, does "not take up the laws of the several states and make all questions pertaining to them [federal] questions, nor does it enable [a federal] court to revise the decisions of the state courts upon questions of state law." *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 166 (1916). As this Court observed in *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) (quoting *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974)), a case raising the very same issue involved here: "We may not 'construe a state statute contrary to the construction given to it by the highest court of a State.'"

The court of appeals' conclusion that it was free to disregard an authoritative ruling of Florida's highest court on the interpretation of Florida statutes conflicts with innumerable decisions of this Court[16] and with the views

---

(Footnote continued from previous page)
the FPSC's authority to approve territorial agreements between natural gas utilities, apparently in response to the decisions of the lower courts in this case. 1989 Fla. Laws ch. 89-292.

[16]*See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 n.9 (1978); *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); *NAACP v. Button* 371 U.S. 415, 432 (1963); *Cramp v Bd. of Public Instruction*, 368 U.S. 278, 235 (1961); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961); *Albertson v. Millard*, 345 U.S. 242, 244 (1953); *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'ers*, 332 U.S. 495, 499-500 (1947); *Hebert v. Louisiana*, 272 U.S. 312, 316-17
(Footnote continued on next page)

expressed by every other circuit court of appeals to have considered the issue in the context of the state action doctrine."[11] The Florida Supreme Court's ruling in *City Gas* "put[] these words in the statute as definitely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 514 (1948). This Court should grant certiorari to insure that federal courts do not impinge on the long-settled right of state courts to have the final word on the content of state law.

2. *The court of appeals disregarded dispositive holdings of this Court.* In *Southern Motor Carriers*, this

---

(Footnote continued from previous page)
(1926); *Supreme Lodge v. Meyer*, 265 U.S. 30, 32 (1924); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 166 (1916).

[11] *See Oberndorf v. City and County of Denver*, 900 F.2d 1434, 1438-39 (10th Cir.) (following Colorado court decisions), *cert. denied*, 111 S. Ct. 129 (1990); *Consolidated Television Cable Service, Inc. v. City of Frankfort, Ky.*, 857 F.2d 354, 361 (6th Cir. 1988) (following "'authoritative interpretation'" of state regulatory statute by state supreme court), *cert. denied*, 109 S. Ct. 1537 (1989); *Campbell v. City of Chicago*, 823 F.2d 1182, 1184 (7th Cir. 1987) ("the Illinois cases that have determined the legislature's intent in enacting § 11-42-6 further convince us that the City's actions were authorized"); *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1433-34 (9th Cir. 1984) ("We are convinced that the California Supreme Court will hold taxicabs are within the coverage of the . . . Act"), *cert. denied*, 471 U.S. 1003 (1985); *Central Iowa Refuse Sys., Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 427 n.15 (8th Cir. 1983) (following decision of Iowa Supreme Court), *cert. denied*, 471 U.S. 1003 (1985); *City of North Olmstead v. Greater Cleveland Regional Transit Authority*, 722 F.2d 1284, 1288 (6th Cir. 1983) (following Ohio court decisions), *cert. denied*, 467 U.S. 1205 (1984); *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805, 810-11 (10th Cir. 1982) (following Colorado Supreme Court decisions), *cert. denied*, 459 U.S. 1126 (1983); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 994 n.4 (3d Cir.) ("We are . . . bound by the Pennsylvania Supreme Court's holding that the Horse Racing Commission was authorized by the legislature to fix jockey fees"), *cert. denied*, 459 U.S. 1022 (1982); *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823, 829 (9th Cir. 1981) (following Arizona Supreme Court decision).

Court held that a Mississippi statute generally providing for rate regulation of intrastate trucking services by the Mississippi Public Service Commission, coupled with the Commission's approval of the particular conduct challenged on antitrust grounds, were sufficient to satisfy the first prong of the *Midcal* test. "As long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." 471 U.S. at 64.

Even apart from its rejection of the Florida Supreme Court's construction of Florida's statutes, the court of appeals' holding that the City Gas-Peoples agreement failed the *Midcal* test squarely conflicts with *Southern Motor Carriers*. Like the Mississippi Public Service Commission, the FPSC "is not authorized to choose free-market competition," but "is required to prescribe rates for [public utilities] on the basis of statutorily enumerated factors." 471 U.S. at 65 n.25. *See* Fla. Stat. §§ 366.041 and 366.06. And like the conduct of the Mississippi truckers in *Southern Motor Carriers*, the territorial agreement between City Gas and Peoples was encouraged and formally approved by the state public service commission pursuant to its regulatory authority. App. I. The two cases are indistinguishable.[18]

Although the court of appeals remarkably neglected even to address City Gas' state action defense with respect to the refusal to sell at wholesale—even though the issue was extensively briefed—that aspect of the holding below is also

---

[18]Indeed, in one respect this is an easier case than *Southern Motor Carriers*. Once the City Gas-Peoples agreement was approved by the FPSC, it became "an order of the commission, binding as such upon the parties." *City Gas*, 182 So.2d at 436. *See also Fla. Public Service Comm'n v. Fuller*, 551 So.2d at 1212 ("Any modification of termination of [an]order [approving a territorial agreement] must first be made by the PSC"). The court of appeals' decision thus creates a direct and unavoidable conflict between City Gas' obligations under federal antitrust law and its obligations under state regulatory law.

controlled by *Southern Motor Carriers*. Fla. Stat. § 366.03 expressly provides that "[n]o public utility shall be required to furnish . . . gas for resale . . ." Like the North Carolina, Georgia and Tennessee statutes considered in *Southern Motor Carriers*, this statute "explicitly permit[s]" the precise conduct for which City Gas has been found liable and thereby satisfies the first prong of the *Midcal* test. 471 U.S. at 63.

B. *Active Supervision.* The decision below is equally inconsistent with settled state action principles on the second prong of the *Midcal* test. The court of appeals held—explicitly in the case of the territorial agreement, and implicitly in the case of the refusal to deal—that the conduct for which City Gas has been found liable is not sufficiently supervised by the State of Florida to satisfy *Midcal*'s "active supervision" standard. Both holdings are inconsistent with the principles articulated by this Court and with the holdings of other circuits.

To satisfy the active supervision requirement, the state must exercise "ultimate control over challenged anticompetitive conduct." *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988). That is, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.*

With respect to the territorial agreement, it would be difficult to conceive of greater supervision. The precise agreement at issue was formally submitted to and expressly approved by the FPSC and would have been void and unenforceable as a matter of state law without that approval. *City Gas*, 182 So.2d at 436. It has been reviewed at regular intervals since that time. *See* FPSC Orders Nos. 3736 (1965), 5495 (1972) and 5800 (1973). And it is subject to rejection or modification at any time as part of the Commission's

ongoing regulatory jurisdiction over every aspect of the operations of retail natural gas distributors in Florida.[19]

The court of appeals' decision that this apparatus was insufficient to satisfy the supervision requirement of the *Midcal* test conflicts with decisions by other circuits finding the requirement satisfied on far less. *See New England Motor Rate Bureau, Inc. v. Federal Trade Comm'n*, 908 F.2d 1064 (1st Cir. 1990) (active supervision requirement was satisfied by Massachusetts regulatory agency's review of proposed trucking rates, even though rate tariffs submitted to agency automatically took effect in 30 days unless disallowed by commission and commission had never convened a hearing on, and had never disallowed, such a tariff); *Fuchs v. Rural Elec. Convenience Cooperative, Inc.*, 858 F.2d 1210, 1218 (7th Cir. 1988) (territorial agreement between electric utilities was adequately supervised where it was initially approved by state regulator and both parties were subject to ongoing regulatory supervision), *cert. denied*, 109 S. Ct. 1744 (1989); *United States v. Southern Motor*

---

[19]Moreover, Commission decisions approving or rejecting proposed territorial agreements are subject to judicial review by the state supreme court. The state constitution and statutes have provided for judicial review of Commission decisions on territorial agreements since the Commission was created in its present form in 1951; since 1980, that review has been by direct, mandatory appeal to the Florida Supreme Court. *See* Fla. Stat. §§ 350.128, 366.10; *Utilities Comm'n of New Smyrna Beach v. Fla. Public Service Comm'n*, 469 So.2d 731 (Fla. 1985) (review by direct appeal); *Peoples Gas Sys., Inc. v. Mason*, 187 So.2d 335 (Fla. 1966) (review by certiorari); *Storey v. Mayo*, 217 So.2d 304 (Fla. 1968) (same), *cert. denied*, 395 U.S. 909 (1969). The Florida Supreme Court's task in such cases is to "decide whether the subject agreement is invalid as being in restraint of trade, contrary to the public interest, or violative of equal protection requirements." *Storey v. Mayo*, 217 So.2d at 306. *Cf. Patrick v. Burget*, 108 S. Ct. 1658, 1664-65 (1988) (Oregon courts did not adequately supervise physician peer-review decisions where no Oregon statute provided for judicial review of such decisions and, even if the Oregon courts were to provide such review, it would not go to the merits of the decision).

Carriers Rate Conference, 702 F.2d 532, 539 & n.12 (5th Cir. Unit B 1983) (en banc) (collective ratemaking was adequately supervised by state regulatory commissions, even though rates took effect absent agency action, where agencies reviewed tariffs and "routinely suspend[ed] their effectiveness"), *rev'd on other grounds*, 471 U.S. 48 (1985).

As for the refusal to sell at wholesale, this Court's reasoning in *Patrick* recognizes that the adequacy of state supervision depends on the content of state policy. *See* 108 S. Ct. at 1663 (supervision is needed to insure "that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests"). The state policy expressed in section 366.03 is simply to give public utilities discretion as to whether or not to provide electricity or natural gas for resale. No Florida regulator or other official, consonant with section 366.03, could disapprove a utility's decision to decline to furnish electricity or gas for resale, for such "disapproval" would necessarily violate the very policy mandated by section 366.03.[20] Since Florida's policy goes no further than to leave a particular decision to the utility, the utility's decision as to whether or not to provide service for resale cannot fail to accord with state policy. Under these circumstances, there is nothing for the state to supervise. *See* Areeda & Hovenkamp, *supra*, ¶ 212.7 at 186 (where a statute "leaves

[20]On the other hand, if the utility *elects* to provide service for resale, the terms and conditions of such a sale must be approved by the FPSC. Fla. Admin. Code r. 25-9.034. In exactly the same way, the regulators in *Southern Motor Carriers* exercised adequate supervision not by reviewing the decision to engage in collective ratemaking in the first instance—which was entirely up to the utility—but by reviewing the results of such ratemaking if the utility elected to do so.

little or nothing to supervise," no further supervision is required).[21]

The state supervision requirement "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). Florida's regulation of natural gas utilities is pervasive, encompassing the rates, services, service areas and every other aspect of the business of natural gas companies operating in the state. That regulatory control satisfies the concerns underlying the state supervision requirement of the *Midcal* test. In the balanced federal system which the state action doctrine is designed to accommodate, states must be free to adopt schemes which permit regulated utilities to pursue what might otherwise be anticompetitive conduct, protecting the public by regulatory means. The decision below, if not corrected by this Court, threatens to stifle the states' ability to adopt regulatory regimes for public energy utilities without subjecting those utilities to federal antitrust liability.

---

[21]"This is not a case in which Florida has purported to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker v. Brown*, 317 U.S. 341, 351 (1943). By creating a broad and pervasive regulatory scheme administered by the FPSC, the state has ensured that public utilities cannot engage in unsupervised private conduct free of any restrictions imposed either by the Sherman Act or by the state. *See* I P. Areeda & D. Turner, *Antitrust Law* ¶ 212c at 70-71 (1978). Within such a system, it is not necessary for the state to supervise the particular conduct challenged in an antitrust action when doing so is unnecessary to further the relevant state policy.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

James J. Kenny
Scott E. Perwin
KENNY NACHWALTER SEYMOUR & ARNOLD, P.A.
400 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 358-8151

Michael Malina,
Counsel of Record
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
Telephone: (212) 836-8000

Attorneys for Petitioner

December 17, 1990